91-1240

Supreme Court, U.S.
FILED
JAN 29 1992
OFFICE OF THE CLERK

No. 91-____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

DANIEL ENGELKE,

Petitioner,

v.

GREGORY A. SCHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

IS THE EIGHTH AMENDMENT VIOLATED IF A PRISONER, BY HIS OWN ADMISSION, SUFFERS NO PHYSICAL ABUSE, PAIN OR INJURY AS A RESULT OF AN OFFICER'S CONDUCT -- CONDUCT THAT INVOLVES ONLY CELL SEARCHES AND NO ACTUAL CONTACT WITH THE PRISONER?

II.

IS A PUBLIC OFFICIAL ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY WHEN, AS THE EIGHTH CIRCUIT CONCEDED, NO PREVIOUS COURT DECISION HAD HELD THE CONDUCT AT ISSUE TO CONSTITUTE AN EIGHTH AMENDMENT VIOLATION?

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Constitutional Provision:

United States Constitution
Eighth Amendment .....*passim*

OPINIONS BELOW

The panel opinion of the United States Court of Appeals is reported at 943 F.2d 921. The opinion is reprinted in the appendix to this petition at A2-A17. The opinion of the district court is unreported but is reprinted in the appendix at A18-A27.

JURISDICTIONAL STATEMENT

Daniel Engelke petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this Case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and § 1343(3) and (4). The opinion of the court of appeals was entered on September 11, 1991. A petition for rehearing or rehearing en banc was denied on November 1, 1991 by an **equally divided** court (A1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The relevant constitutional provision involved in this case is the Eighth Amendment which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

This petition arises from a decision of the Eighth Circuit Court of Appeals affirming an order of the District Court for the Eastern District of Missouri. This Order denied petitioner's motion for judgment notwithstanding the verdict, or alternative motion for new trial.

This litigation involved respondent, a Missouri prisoner, and two correctional

officers.[1] While the allegations of respondent were vigorously disputed at trial, for purposes of appeal and this petition, they are construed in respondent's favor. Respondent alleged that petitioner searched respondent's cell ten times during a three week period of time and left the cell in a state of "disarray" three times. Respondent explicitly admitted that there was no physical abuse of him by petitioner. The jury awarded $0 in actual damages (changed *sua sponte* by the trial court to $1) and $1000 in punitive damages.

The case was presented to the jury under the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. The district court affirmed

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[1]The other correctional officer did not appeal the jury verdict and is not a party to this petition.

the jury award even though respondent testified that he was not physically abused by petitioner. There was no physical contact between petitioner and respondent. The respondent did not present any evidence of mental distress and did not claim to suffer a significant injury as a result of the cell searches.

The district court found that the Eighth Amendment does protect prisoners from searches conducted only for calculated harassment. The district court cited ***Hudson v. Palmer***, 468 U.S. 517, 530 (1984), a case involving the Fourth Amendment. The district court further denied petitioner qualified immunity finding that ***Hudson v. Palmer*** clearly established a constitutional right. The Eighth Circuit affirmed finding that the Eighth Amendment can be violated even if there was no physical abuse, injury or pain. The Eighth Circuit also denied petitioner qualified immunity.

The district court's order was issued on July 31, 1990. The opinion of the Eighth Circuit was issued on September 11, 1991. Petitioner filed a timely petition for rehearing or rehearing en banc, which was denied by an **equally divided** court on November 1, 1991.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's Holding that the Eighth Amendment Can be Violated without Physical Abuse, Pain or Injury is Contrary to Decisions of this Court and an Unprecedented Expansion of the Eighth Amendment.

The primary issue in this case is whether petitioner's alleged searches of respondent's cell which involved no abuse, no injury, no pain, and no contact, can constitute cruel and unusual punishment under the Eighth Amendment. This Court has held cell searches do not violate the Fourth

Amendment. No court has ever found cell searches to violate the Eighth Amendment. Further, this Court and the Eighth Circuit have consistently held that the infliction of pain is an essential element of an Eighth Amendment violation. There was no pain inflicted here. The alleged conduct could not have constituted cruel and unusual punishment.[2]

I. Numerous Supreme Court and Appellate Court Cases Declare that Pain is a Prerequisite to an Eighth Amendment Claim.

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[2]The Eighth Circuit concluded that the constitution was violated because there was a "retaliatory" aspect to the cell searches (A11). See also A15 ("retaliation for the exercise of a constitutional right"). In this case, however, no first amendment retaliation claim was asserted or presented to the jury. In addition, no Fourth Amendment claim was asserted. Only the Eighth Amendment claim was asserted and presented to the jury.

This Court has repeatedly held that an Eighth Amendment claim requires some infliction of pain: "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." ***Whitley v. Albers***, 475 U.S. 312, 319 (1986), *quoting* ***Ingraham v. Wright***, 430 U.S. 651, 671 (1977) and ***Estelle v. Gamble***, 429 U.S. 97, 103 (1976).

Recently, this Court reiterated that "only the 'unnecessary and wanton infliction of pain' implicates the Eighth Amendment". ***Wilson v. Seiter***, __ U.S. __, 111 S.Ct. 2321, 2323 (1991), *quoting* ***Estelle v. Gamble***, *supra*. Accord, ***Rhodes v. Chapman***, 452 U.S. 337, 346 (1981) (the Eighth Amendment prohibits punishments which "involve the unnecessary and wanton infliction of pain").

The Eighth Circuit has previously held that an action for "cruel and unusual punishment" cannot be established "without a

showing of some measure of pain of some type." ***Cowans v. Wyrick***, 862 F.2d 697, 699 (8th Cir. 1988). The Eighth Circuit has previously rejected a prisoner's Eighth Amendment claim for failure to "fulfill the second aspect of the ***Cowans*** test by failing to present evidence of pain." ***Rodgers v. Thomas***, 879 F.2d 380, 385 (8th Cir. 1989).

In the case at bar, the respondent expressly admitted, and the Eighth Circuit found, there was no physical pain (A4-A28), and there was no evidence of mental pain. While respondent's cell was allegedly searched ten times in nineteen days, the cell was allegedly left in disarray only on three occasions (A4). Thus, under this record, on seven occasions when respondent's cell was allegedly searched, it was not searched in a manner that caused the respondent harm or inconvenience.

II. Cell Searches that Involve no Pain or Contact with the Inmate cannot Constitute Cruel and Unusual Punishment.

The Eighth Circuit's holding expands the scope of the Eighth Amendment in an unprecedented manner. Previously, the Eighth Amendment has been held to involve situations where there has been actual physical contact involving the state actor and the prisoner resulting in physical abuse, pain or injury. The Eighth Circuit's holding allows an Eighth Amendment claim when there is no physical contact between the officer and the prisoner, where the inmate suffers no physical abuse, pain or injury and in situations where the inmate is not even present when the officer acts. In effect, the Eighth Circuit has expanded the scope of the Eighth Amendment to include virtually every aspect of the relationship between correctional officers and prisoners.

This Court has stated that "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny . . . ." ***Whitley v. Albers***, 475 U.S. at 319. The fact that conditions under which an inmate lives are restrictive and even harsh is not actionable; such conditions are "part of the penalty that criminal offenders pay for their offenses against society." ***Rhodes v. Chapman***, 452 U.S. at 347. This Court has warned that courts must proceed cautiously in making an Eighth Amendment judgment because "unless we reverse it, '[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment.'" *Id.* at 351.

This Court has previously rejected reasoning that would make the constitutional amendments "a font of tort law to be superimposed upon whatever systems may already be administered by the States." ***Paul***

v. Davis, 424 U.S. 693, 701 (1976). The Eighth Circuit's holding in this case expands the scope of the Eighth Amendment to regulate virtually every aspect of the relationship between correctional officers and prisoners. The Eighth Amendment was never intended to be applied in such a manner. Rather, the Eighth Amendment's cruel and unusual punishment clause was intended to protect prisoners from the willful and wanton infliction of pain. Conflicts between correctional officers and inmates that do not result in physical abuse, pain or injury should not be subject to scrutiny under the Eighth Amendment.

III. An Eighth Amendment Claim Requires Significant or Substantial Injury or Pain.

This Court is now considering a case involving the issue of whether the Eighth Amendment is violated if an inmate's physical injuries were not "significant." *Hudson v. McMillian*, 929 F.2d 1014, cert. granted, __

U.S. __, 111 S.Ct. 1579 (1991). This Court heard oral arguments in this case on November 13, 1991. As of this date, the court has not rendered a decision.

The ***Hudson v. McMillian*** case arose from the Fifth Circuit which requires a significant injury for an Eighth Amendment violation. *See e.g.*, ***Johnson v. Morel***, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) ("use of excessive force does not give constitutional import . . . to minor harms"); ***Huguet v. Barnett***, 900 F.2d 838, 840 (5th Cir. 1990) ("significant injury" required). For example, in ***Hudson v. McMillian***, this Court is considering whether minor bruises and swelling which required no medical attention constitute a "significant injury" to satisfy the Eighth Amendment. In the case at bar, however, there is no evidence of any injury whatsoever.

The record shows that respondent suffered no pain at all, physical or mental.

Not only did respondent specifically disavow any physical pain (A4-A28), he failed to testify that the alleged cell searches caused him trauma, anguish, misery, mental pain, mental distress, or even bruised feelings. Injury cannot be presumed. ***Cowans v. Wyrick***, 862 F.2d at 700.

The Eighth Circuit's opinion goes beyond any precedent. There are simply no cases in which anything short of physical pain has been sufficient to sustain a verdict for a prisoner in an Eighth Amendment claim. Courts have repeatedly held conduct involving more intrusiveness and a greater infliction of pain than that found here was insufficient as a matter of law to sustain an Eighth Amendment claim. *See, e.g.*, ***Rodgers v. Thomas***, *supra*, 879 F.2d 384 (a prisoner stripped to his underwear, placed in an isolation cell for five days with nothing but mattress on the floor, a sheet and a blanket, leaving prisoner to catch the flu, all for no

valid penological purpose; summary judgment affirmed because injury was "minimal"); ***Cowans v. Wyrick***, *supra*, 862 F.2d 697 (door slammed on prisoner's hands; remanded because jury was not instructed it must find pain); ***Wyatt v. Delaney***, 818 F.2d 21 (8th Cir. 1987) (officer intentionally shoved prisoner for no reason, allegedly causing humiliation; judgment for officer affirmed because injury was only "bruised feelings" and thus de minimis); ***Black Spotted Horse v. Else***, 767 F.2d 516 (8th Cir. 1985) (summary judgment affirmed where prisoner alleged officer poked him, bruised his leg, and spoke to him in a belligerent tone; insufficient to constitute cruel and unusual punishment); ***Roy v. Jenkins***, No. 86-C-5738 (N.D. Ill. July 11, 1988) (1988 WESTLAW 74709, Allfeds Library); (summary judgment granted where officers covered prisoner's mattress with feces in absence of proof prisoner was "seriously affected"); ***Sampley v. Ruettgers***, 704 F.2d

491 (10th Cir. 1983) (pushing prisoner and spitting on hair clippers to be used on prisoner insufficient; pain is an element of Eighth Amendment Claim and must constitute "more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury"); ***Pressly v. Gregory***, 831 F.2d 514, 518 (4th Cir. 1987) (constitutional violation requires "verifiable injury").

These cases are just a sample of the numerous situations where prisoners have actually suffered physical pain or injury without the Eighth Amendment being violated. In the case at bar, the prisoner -- by his own admission -- did not suffer any physical abuse, pain or injury. There was no evidence of mental distress or anguish. While the prisoner may have been inconvenienced by the alleged cell searches, the Eighth Amendment is simply not implicated where there is no significant pain or injury.

Should this Court affirm the Fifth Circuit's holding in ***Hudson v. McMillian***, *supra*, then petitioner suggests it would be appropriate to grant this petition for writ of certiorari and either reverse outright the Eighth Circuit's decision or remand this case to the Eighth Circuit for reconsideration of its holding in light of the affirmance in ***Hudson v. McMillian***.

IV. The Eighth Circuit Misinterprets this Court's holding in Hudson v. Palmer.

The Eighth Circuit sustained the verdict based on its reading of *dicta* in ***Hudson v. Palmer***, 468 U.S. 517, 530. In doing so, the Eighth Circuit misapplied well-established qualified immunity principles set forth by this Court. While admitting that "no court has held that cell searches constitute an Eighth Amendment violation" (A16), the Eighth Circuit nonetheless considered this

"irrelevant" on the qualified immunity issue (A16).

In ***Hudson v. Palmer***, this Court held that cell searches did not violate the Fourth Amendment. In the case at bar no Fourth Amendment claim was asserted or presented to the jury. The Court stated that the fact that the Fourth Amendment was not violated did not necessarily mean that the inmate was "without a remedy for calculated harassment unrelated to prison needs." *Id.* at 530. The Eighth Circuit interpreted this to mean that the Eighth Amendment prohibits all instances of calculated harassment unrelated to prison needs, without regard to the sufficiently serious injury component or the physical pain element of the Eighth Amendment.

The *dicta* in ***Hudson v. Palmer*** should not be read to override prior Eighth Amendment cases that required injury or pain, particularly in light of the many subsequent cases from this Court and elsewhere requiring

a sufficiently serious deprivation or injury. Indeed, ***Hudson v. Palmer*** itself involved an allegation that a cell search was conducted solely for purposes of harassment, and summary judgment was granted and sustained on the Eighth Amendment claim. ***Palmer v. Hudson***, 697 F.2d 1220, 1221, n. 1 (4th Cir. 1983).

The Eighth Circuit's holding misapplies well-established qualified immunity principles. While this Court has stated that the action in question need not have been previously held unlawful, it has said that "in the light of pre-existing law the unlawfulness must be apparent." ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987). Public officials, however, are certainly entitled to rely on previous case law in determining whether their conduct would violate a clearly established constitutional right. Contrary to the Eighth Circuit's reasoning, it is of major significance to an appropriate

qualified immunity analysis that no court case has ever found a cell search violative of the Eighth Amendment.

The Eighth Circuit relies on the *dicta* in ***Hudson v. Palmer*** to find that the prisoner had a clearly established constitutional right. The constitutional right the Eighth Circuit found clearly established was the "law making retaliation for the exercise of a constitutional right actionable under § 1983 . . ." (A15). Retaliation, however, is not an Eighth Amendment violation, but, rather, a First Amendment concept. Respondent did not assert a First Amendment claim in this case.

This Court has recently noted that the threshold inquiry in determining qualified immunity is whether the respondent has established "the violation of any constitutional right at all." ***Siegert v. Gilley***, __ U.S. __, 111 S.Ct. 1789, 1794 (1991). The discussion above demonstrates that respondent has failed to establish an

Eighth Amendment violation at all. Under no stretch of the imagination, however, can it be held that respondent has demonstrated a clearly established constitutional right. The fact that this Court is considering an Eighth Amendment case where far more egregious conduct, resulting in far more serious injury and pain, did not violate the Eighth Amendment, is persuasive argument that the law was not clearly established in this area.

V. The Eighth Circuit Holding Sets a Dangerous Precedent for Public Policy Reasons.

The Eighth Circuit opinion establishes such a low threshold for conduct to constitute cruel and unusual punishment that it is contrary to principles previously set forth by this Court. Furthermore, the Eighth Circuit opinion will have a severe chilling effect on corrections officers. These officers, searching prisoner cells by

necessity, will realize that there is a risk of having a judgment entered against them when a prisoner claims that his cell was searched too often and not left in a neat condition each time.

Cell searches are an important component for establishing and maintaining internal prison security. In maximum security institutions or units, daily cell searches are not uncommon to control contraband and weapons and deter security problems. The Eighth Circuit's holding could have the effect of inhibiting correctional officers from performing searches necessary to the safety and security of the institution. The Eighth Circuit holding could result in thousands of frivolous civil rights actions challenging repeated cell searches or cell searches that were less than tidy. This Court should make clear that the phrase "cruel and unusual punishment" retains some semblance of its ordinary meaning.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Court to grant a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2563EM

Gregory A. Scher,	)	
	)	
Appellee,	)	
	)	
v.	)	Order Denying
	)	Petition for
Daniel Engelke,	)	Rehearing with
	)	Suggestion for
Appellant.	)	Rehearing En Banc

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges J. Gibson, Fagg, Bowman, Magill and Beam would grant.

Rehearing by the panel is also denied.

November 1, 1991

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

Gregory A. Scher, Appellee,

v.

Daniel Engelke, Appellant.

No. 90-2563

United States Court of Appeals,
Eighth Circuit.

Submitted April 10, 1991.

Decided Sept. 11, 1991.

Rehearing and Rehearing En Banc
Denied Nov. 1, 1991

Before LAY, Chief Judge, and PECK* and ROSS, Senior Circuit Judges.

JOHN W. PECK, Senior Circuit Judge, Daniel Engelke appeals from the district court's[1] denial of his motion for judgment

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*The Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

[1]The Honorable Stephen N. Limbaugh, District Judge, United States Court for the Eastern District of Missouri.

notwithstanding the jury verdict in this 42 U.S.C. § 1983 action. For the reasons stated below, we affirm.

I. FACTS

During the time period relevant to this suit, Appellee Gregory Scher was an inmate at Missouri Eastern Correctional Center (MECC). Appellant Daniel Engelke was a prison guard at MECC. James Smith, another MECC guard and defendant in this case, approached Scher requesting a source for contraband weapons. Scher reported this to prison officials. After repeated demands from Smith, Scher gave Smith a note with the name of a purported weapons source. The note was found in Smith's hat as he left MECC. Prison policy prohibits the removal of anything, including a note, from the premises. Following this infraction, Smith was transferred to tower duty. Smith again violated prison policy by making phone calls from the tower into the

prison allegedly threatening Scher. Following this incident, Smith was placed on administrative leave and he subsequently resigned.

Following Smith's resignation, Scher's cell was searched repeatedly. Appellant Engelke searched Scher's cell ten times in nineteen days. On three occasions the cell was left in disarray. Several items such as pens, tape, and a washcloth were confiscated during the searches. On one occasion Engelke issued a conduct violation against Scher for having a television set in his cell that did not appear on his property list. The television set belonged to another inmate who had loaned it to Scher's roommate. However, Scher's roommate was not issued a conduct violation. Scher was not physically abused during any of these searches.

In May 1986, Scher commenced the present action by filing a pro se complaint naming numerous prison personnel. Most of the

defendants were dismissed prior to the completion of the trial. However, Scher's claims against Engelke were submitted to the jury on eighth amendment grounds. The jury found against Engelke and Smith and awarded Scher $1000 punitive damages from each. The jury did not award any actual damages, but the district court awarded $1 nominal damages *sua sponte*. Engelke made a motion for judgment notwithstanding the verdict which the district court denied. Engelke appealed to this court.

II. ANALYSIS

A. *Denial of JNOV motion*

A directed verdict or JNOV may be entered "only where all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party." *Sunkyong International, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1248 (8th Cir. 1987). In

reviewing the district court's denial of Engelke's JNOV motion, this court must apply the same standard as the district court. *Morgan v. Arkansas Gazette*, 897 F.2d 945, 948 (8th Cir. 1990). This standard requires that the court:

> 1) consider the evidence in the light most favorable to [Scher], who prevailed with the jury; 2) assume that all conflicts in the evidence were resolved by the jury in [Scher's] favor; 3) assume as proved all facts which [Scher's] evidence tends to prove; 4) give [Scher] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) affirm the denial of the motion if reasonable persons could differ as to the conclusions to be drawn from it.

Id.

In denying Engelke's JNOV motion, the district court relied on *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1982). In *Hudson*, an inmate brought a § 1983 action alleging that a prison officer

had conducted an unreasonable shakedown search of his cell and had filed a false charge under prison disciplinary procedures against the inmate solely for harrassment purposes. The Supreme Court held that the inmate was not entitled to constitutional protection from unreasonable searches. However, the Court stated:

> Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against "cruel and unusual punishments."

468 U.S. at 530, 104 S.Ct. at 3202.

Additionally, the district court cited *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), for the standard used to determine whether the

conduct of prison officials violates the eighth amendment. In *Whitley*, the Court stated:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.
>
> . . . . .
>
> The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.

475 U.S. at 319-20, 106 S.Ct. at 1084.

The district court noted that the jury found that Engelke had in fact searched Scher's cell ten times in nineteen days and left the cell in disarray after three of the

searches, and that these actions constituted cruel and unusual punishment. Applying the *Hudson* and *Whitley* standards, the district court found that there was evidence from which the jury could conclude that an eighth amendment violation had occurred. Thus, the district court concluded that all the evidence did not support Engelke's proposition and denial of the JNOV motion was proper. *Sunkyong, supra.*

[1,2] On appeal, Engelke's primary argument is that pain is a necessary element of an eighth amendment claim and a cell search that involved no abuse, injury or pain cannot constitute cruel and unusual punishment. We cannot agree with Engelke's narrow interpretation of eighth amendment protection. In *Rodgers v. Thomas*, 879 F.2d 380, 384 (8th Cir. 1989), this court stated that "[i]n order to establish an eighth amendment violation after incarceration, a prisoner must establish the unnecessary and wanton

infliction of pain, mental or physical." In *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988), this court stated that "the jury must have found that plaintiff suffered anguish, misery or pain in order to establish that cruel and unusual punishment was inflicted." In *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984), this court recognized that violent attacks or the constant fear of such violence could constitute a violation of the eighth amendment. Additionally, *Whitley, supra*, teaches that the general requirement that the plaintiff allege and prove "the unnecessary and wanton infliction of pain should also be applied with due regard for the differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U.S. at 320, 106 S.Ct. at 1084. Thus, the scope of eighth amendment protection is broader than the mere infliction of physical pain at Engelke urges, and evidence of fear, mental anguish, and misery

inflicted through frequent retaliatory cell searches, some of which resulted in the violent dishevelment of Scher's cell, could suffice as the requisite injury for an eighth amendment claim.

The evidence in this case showed that Scher was the victim of Smith's coercive efforts to obtain illicit weapons. Scher acted responsibly in reporting this to prison officials. Smith eventually resigned rather than be removed from his position. Shortly thereafter, Scher, an honor inmate, was subjected to numerous cell searches and an undeserved conduct violation from Engelke. Engelke testified that he had no reason to believe that Scher had contraband in his cell when he conducted the cell searches. Considering these facts in the light most favorable to Scher and giving him the benefit of reasonable inferences, the evidence clearly does not all point to Engelke's position. Instead, it evidence a pattern of calculated

harassment unrelated to prison needs from which the U.S. Supreme Court has stated that prisoners are protected. *Hudson, supra*. Thus, the district court correctly denied Engelke's JNOV motion.

Engelke also argues that previously no other court has found cell searches to violate the eighth amendment. However, the cases on which he relies are easily distinguishable from the present case. None involved the retaliatory aspect so prominent in this case. In *Hudson, supra*, the inmate only alleged one shakedown search. The evidence in the present case discloses ten searches in nineteen days under circumstances which a jury would be justified in finding were motivated by retaliation for Scher's efforts to blow the whistle on a corrupt guard.

In *Vigliotto v. Terry*, 873 F.2d 1201 (8th Cir. 1989), an inmate brought a § 1983 action alleging that prison officials had

violated he eighth amendment rights by conducting several harassing searches, one of which involved the confiscation of legal materials. The district court granted summary judgment to the prison officials. The Ninth Circuit cited *Hudson, supra,* for the proposition that "[t]he Eighth Amendment protects prisoners from searches conducted only for 'calculated harassment.'" *Id.* at 1203. However, the Ninth Circuit affirmed the district court noting that only one search could be substantiated and that a "single incident is insufficient to satisfy *Whitley.*" *Id.* Again, the substantiated conduct in this case is much more egregious than that in *Vigliotto.*

In *Balabin v. Scully,* 606 F.Supp. 176 (S.D. N.Y. 1985), an inmate asserted that cell searches violated the eighth amendment. While the court acknowledged *Hudson, supra,* it dismissed the inmate's claims because he had made no allegations of harass-

ment nor alleged facts establishing an invasion of privacy that rose to the level of cruel and unusual punishment. *Id.* at 1984. In contrast, Scher made strong allegations that he was harassed through the searches and an undeserved conduct violation concerning his roommate's television. Thus, *Balabin* has no application to this case. In sum, these cases do not involve the obdurate and wanton harassment and retaliation in the present case.

B. *Qualified Immunity*

[3] Engelke next argues that he is entitled to qualified immunity. He cites *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), for the proposition that an official is immune from liability for civil damages when his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. He asserts that the passage from *Hudson*,

supra, is merely *dicta* and therefore does not clearly establish a constitutional right. We cannot agree.

Contrary to Engelke's assertions, we are not dealing with an esoteric matter of unsettled law of which a guard could not reasonably be expected to know. This is a clear case of a prisoner who was subjected to retaliatory cell searches and conduct violations for bringing the illicit conduct of a prison guard to the attention of prison officials. The law making retaliation for the exercise of a constitutional right actionable under § 1983 has been established for some time and an objectively reasonable official could not fail to know of it. *Freeman v. Blair*, 862 F.2d 1330, 1332 (8th Cir. 1988) (citing *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Buise v. Hudkins*, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 440 U.S. 916, 99

S.Ct. 1234, 59 L.Ed.2d 466 (1979)). Furthermore, the fact that previously no court has held that cell searches constitute an eighth amendment violation is irrelevant. The U.S. Supreme Court has stated that the action in question need not have been previously held unlawful, "but in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Coffman v. Trickey*, 884 F.2d 1057, 1063 (8th Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 1523, 108 L.Ed.2d 763 (1990). Certainly the unlawfulness of Engelke's retaliatory conduct must have been apparent to him. The basic course of decent human conduct precludes the infliction of such trauma on one in custody.

III. CONCLUSION

Thus we would in any event be strongly inclined to find the evidence of Engelke's

conduct sufficiently egregious to support the jury's verdict, and to hold as a matter of law that he had not established an immunity defense. These conclusions are strongly bolstered by the clarity of the evidence establishing Engleke's retaliatory motivation. Accordingly, we affirm the district court's denial of Engelke's JNOV motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GREGORY A. SCHER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 86-1100 C (5)
	)	
DICK MOORE, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff initiated this action against several defendants alleging various violations of his constitutional rights while an inmate in the custody of the Missouri Department of Corrections and Human Resources. Plaintiff's allegations against Engelke are basically that Engelke searched plaintiff's cell ten times in nineteen days simply to harass plaintiff, and on three occasions left his cell in substantial disarray. Plaintiff was never touched during the cell searches. Plaintiff also contends that defendant Engelke took his personal

property which consisted of, inter alia, pens and paper.

The Court submitted plaintiff's claim to the jury against defendant Engleke based on the Eighth Amendment guarantee to be free from cruel and unusual punishment. The jury returned a verdict in favor of plaintiff and against defendant Engelke, awarding plaintiff nothing in actual damages, but $1,000 in punitive damages. This matter is before the Court on defendant Daniel Engelke's motion for judgment notwithstanding the verdict, or alternative motion for a new trial.

Judgment notwithstanding the verdict may be properly entered where all the evidence points to movant's position and no reasonable inference sustains the position of the non-moving party. *Sunkyong International v. Anderson Land & Livestock*, 828 F.2d 1245, 1248 (8th Cir. 1987). In deciding a motion for jnov, the court must consider all evidence in the light most favorable to the

prevailing party, assume all conflicts in the evidence were resolved by the jury in favor of the prevailing party, and assume as proved all facts which the prevailing party's evidence tended to prove. *Id.*

Defendant Engelke's first ground for jnov is that the facts do not support a finding of cruel and unusual punishment. The case against Engelke went to the jury solely on Eighth Amendment grounds. This Court instructed the jury that for Engelke's actions to have constituted cruel and unusual punishment, they must have constituted "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." See, Jury Instruction No. 13. The jury found that Engelke had in fact searched plaintiff's cell ten times in nineteen days for no reason other than harassment, and that Engelke had left plaintiff's cell in a state of total disarray after several of those searches, and that

these actions constituted cruel and unusual punishment.

Contrary to the erroneous assertions of defendant, the Eighth Amendment does protect prisoners from searches conducted only for "calculated harassment." *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). In *Whitley v. Albers*, 475 U.S. 312 (1986), the Supreme Court refined the standard for determining whether prison authorities' conduct violates the eighth amendment.

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. . . .
>
> The general requirement that an Eighth Amendment claimant allege and approve the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against

> which an Eighth Amendment objections is lodged.

Whitley, 475 U.S. at 319-20.

Applying this standard, the Court finds that there is evidence from which the jury could have found that defendant Engelke's conduct constituted cruel and unusual punishment. Defendant contends that no court in the country has held that harassing cell searches constitute cruel and unusual punishment, and cites three cases in support of this proposition. However, this Court finds that each of these cases is clearly distinguishable. For instance, defendant cites the case *Vigliotto v. Terry*, 873 F.2d 1201 (9th Cir. 1989), in which the court granted defendant's motion for summary judgment on eighth amendment grounds. In that case, however, the defendant conducted only one harassing search. Here, defendant Engelke conducted ten searches over a nineteen day period for the sole purpose of harassing

plaintiff. Although one harassing search may be legally insufficient to constitute cruel and unusual punishment, ten may well be sufficient, and the jury has apparently found this to be the case. The Court finds the other two cases cited by defendant for this proposition to be equally unpersuasive. Considering all of the evidence in the light most favorable to plaintiff, the Court finds that all the evidence does not pint to defendant Engelke's position. Thus, the Court will deny defendant's motion on this ground.

Defendant Engelke's second ground for jnov is that he is protected by qualified immunity. A prison official is entitled to immunity from damage, unless his conduct violated a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the Supreme Court has noted that harassing cell searches can constitute cruel and unusual punishment under the

eighth amendment, defendant's argument clearly must fail. When defendant searched plaintiff's cell ten times in nineteen days for no reason other than harassment, which the jury found to be the case, defendant's conduct violated a clearly established constitutional right set forth in *Hudson v. Palmer*, 468 U.S. 517 (1984). Accordingly, the Court will deny defendant's motion on this ground.

Finally, defendant argues that the jury's verdict of no actual damages shows that the jury found plaintiff was not injured. The verdict, however, clearly indicates that the jurors found that defendant Engelke had violated plaintiff's constitutional rights. The jury chose not to place a monetary value on the harm that plaintiff suffered. In such a situation, the injured party is entitled to nominal damages. *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988). Although this Court manifestly lacks the power to add to the amount of the verdict for either compensa-

tory or punitive damages, when the amount of damages is not disputed and a party is entitled to damages under the verdict as a matter of law, the court may award the undisputed amount. *Taylor v. Green*, 868 F.2d 163, 165 (5th Cir. 1989). Thus, this Court may award nominal damages of $1.00 when the plaintiff has shown that his constitutional rights had been violated, even though he had not proved his right to actual damages. *Taylor*, 868 F.2d at 165. Accordingly, the Court will modify the judgment to provide an award of $1.00 in nominal damages against defendant Engelke.

The Court finds defendant's argument that plaintiff failed to establish his eighth amendment claim because he failed to establish actual damages to be without merit. Clearly, the jury found in favor of plaintiff on his claim for cruel and unusual punishment because it expressly indicated this on the verdict form. Finally, a jury need not find

a plaintiff is entitled to compensatory damages in order to award punitive damages. *See Stolberg v. Members of Bd. of Trustees for State College of Connecticut*, 474 F.2d 485, 489 (2d Cir. 1973).

Although defendant Engelke has raised other arguments in support of his motion for judgment notwithstanding the verdict, the Court finds them to be without merit.

Accordingly,

IT IS HEREBY ORDERED that the judgment entered in favor of plaintiff an against defendant Engelke on October 5, 1989, for compensatory damages is **MODIFIED** to reflect an amount equal to ONE DOLLAR ($1.00).

IT IS FURTHER ORDERED that defendant Engelke's motion for judgment notwithstanding the verdict, or alternative motion for new trial, is **DENIED**.

Dated this 31st day of July 1990.

UNITED STATES DISTRICT JUDGE

Q. Were you ever physically abused --

Were you ever physically injured while you were at the Missouri Correctional Center?

A. No

---

* Testimony of Respondent. Trial Transcript, Volume II, p. 142. Scher v. Moore, et al., No. 86-1100-C-5 (E.D. Mo.).

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

No. 91-1240

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

DANIEL ENGELKE,

Petitioner,

v.

GREGORY A. SCHER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RALPH W. KALISH, JR.
Missouri Bar No. 26890

818 Olive Street, S. 1600
St. Louis, Missouri 63101
Phone: (314) 436-1331

ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

I.

IS THE EIGHTH AMENDMENT VIOLATED IF A PRISON GUARD REPEATEDLY SEARCHES AN INMATE'S CELL FOR NO PRISON NEED EXCEPT FOR THE SOLE PURPOSE OF CALCULATED HARASSMENT OF THE INMATE?

II.

IS A PUBLIC OFFICIAL ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY WHEN THE UNLAWFULNESS OF HIS CONDUCT IS APPARENT IN THE LIGHT OF PRE-EXISTING LAW?

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STATEMENT OF THE CASE

During the relevant period of the acts complained of by Gregory A. Scher, respondent, he was an inmate and Daniel Engelke, petitioner, was a prison guard at the Missouri Eastern Correctional Center ("MECC") at Pacific, Missouri. Respondent's action against petitioner and other Missouri Department of Corrections officials stems from their efforts to retaliate against and harass respondent because he reported another prison guard, James H. Smith, who attempted to force respondent to provide Smith with a source of contraband weapons and threatened the lives of respondent and his family if respondent failed to do so.

Respondent and his brother reported this matter to prison officials, including the prison's institutional investigator, Ron Kennedy, for several months, and finally, a plan was developed to provide proof of Smith's actions. Respondent fully cooperated with Kennedy and his fellow officers: respondent gave Smith a note with information on it purporting to be a source for the contraband weapons. On September 30, 1985 the note was found in Smith's hat while he was leaving the institution. Taking anything out of the prison by staff is prohibited by policy.

Smith was transferred to tower duty after the note was found. After he made calls from the tower to inmate Ron Cooper threatening respondent, he was put on administrative leave. Smith resigned as a guard just before he would have been dismissed.

Kennedy was only concerned with violation of technical prison rules which forbid staff from (i) taking anything out of

the prison, such as the note, and (ii) making calls to inmates inside the prison. Kennedy never investigated the contents of the note about Smith's expressed interest in obtaining contraband weapons or the substance of the phone calls concerning Smith's threats to cause harm to respondent.

Prior to the incident involving Smith, respondent had never been cited by MECC officials for any conduct violations and in fact was chosen for, and participated in, that prison's expectancy program for honor inmates, held various jobs at MECC and was a paid employee of St. Louis Community College. After the incident involving Smith, respondent was the object of repeated cell searches by petitioner which were undertaken solely for purposes of harassment and without connection to any prison purpose.

Petitioner searched respondent's cell ten times in nineteen days solely to harass respondent. On three occasions petitioner left plaintiff's cell in disarray; defendant took pens and paper from plaintiff; and petitioner cited him for a bogus conduct violation. Defendant had no credible reason to conduct these searches other than harassment.

Petitioner testified that he was instructed to confiscate metal coat hangers and clotheslines from inmates' cells and that he found the former in respondent's cell. Yet, petitioner did not cite respondent for any conduct violation for, and he did not query plaintiff as to how he obtained, same.

It is manifest that petitioner's testimony as to his supposed purpose was not credible. Clearly, the jury and the trial court attached no credibility to it. Although petitioner searched plaintiff's cell ten times in nineteen days -- during which entire time and for months prior thereto a television set was in plain view -- petitioner only confiscated same on his tenth search and then only after another staff member, whose name he could not remember, supposedly told him to do so. Petitioner then issued a conduct violation to respondent because the television set was not identified on respondent's property list, notwithstanding the fact that respondent did not claim the television set as his. More revealingly, respondent's roommate was not issued a conduct violation altnough the record shows the t.v. was being lent to him and his property list was devoid of any mention of it. Petitioner then incredibly testified that the conduct violation was issued to plaintiff because he volunteered for it.

Clearly, no legitimate prison purpose was served by these acts.

The jury found that petitioner's actions constituted cruel and unusual punishment in violation of the prohibitions of the Eighth Amendment; the district court ratified the jury's finding by its own review and denial of defendant's motion for judgment notwithstanding the verdict, or in the alternative, a new trial; the appellate court affirmed the district court's denial; and the

appellate court en banc denied petitioner's petition for rehearing.

SUMMARY OF ARGUMENT FOR REASONS FOR DENYING THE WRIT

The judgment by the jury, as ratified by the district court and affirmed by the appellate court, must be affirmed because petitioner conducted repeated cell searches for the sole purpose of calculated harassment which constituted cruel and unusual punishment and thereby violated the Eighth Amendment; and because petitioner is not entitled to qualified immunity because such acts violated clearly established constitutional rights.

I. THE EIGHTH AMENDMENT WAS VIOLATED BY PETITIONER'S REPEATED CELL SEARCHES BECAUSE THEY BORE NO CONNECTION TO PRISON NEED AND WERE FOR THE SOLE PURPOSE OF "CALCULATED HARASSMENT"

The Eighth Amendment protects prisoners from obdurate and wanton searches. Hudson v. Palmer, 468 U.S. 517 (1984); Whitley v. Albers, 475 U.S. 312, 319-20 (1986).

No prison need was served by petitioner's repeated searches of respondent's cell and bogus conduct violation. It is this complete lack of any recognizably legitimate prison purpose whatsoever that reveals the obduracy and wantonness of petitioner's acts. Petitioner did not conduct a solitary search

but rather a constant stream of searches for the sole purpose of harassing respondent.

Prior to his cooperating with prison officials about guard Smith's conduct, respondent was a stellar inmate, having been awarded and found deserving of the maximum privileges available to an honor inmate. However, as soon as respondent cooperated with prison officials to rout out the potentially felonious acts of defendant Smith, petitioner undertook his harassing conduct.

In Whitley, this Court stated the standard for determining whether prison authorities' conduct violates the Eighth Amendment prohibition of cruel and unusual punishment.

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause. . . .

Whitley, 475 U.S. at 319-20.

Respondent fully recognizes the restrictions on an inmate's liberty attending life as an inmate. Respondent does not complain that prisons are not run like country clubs; that his tender sensitivities and feelings were hurt by petitioner's error in good judgment or other impolite, indelicate, or inadvertent action; that petitioner violated his right to privacy of his person, cell and effects; or that petitioner has no obligation or right to take reasonable action to maintain or restore the security of the prison.

Rather, petitioner's petition -- just like his appeal and defense below -- arrogantly and coldly seeks this Court's imprimatur on his malicious ad terrorem acts against respondent. The issue before this Court is simply whether petitioner violated respondent's rights under the Eighth Amendment by conducting ten cell searches over nineteen days and confiscating insignificant items as revealed by petitioner's failure to cite respondent for conduct violations for same, all for the purpose of harassing plaintiff; there was no prison disturbance, no threat to prison security, no alleged breach of institutional rules by respondent or any other inmate or other legitimate prison need.

Petitioner erroneously asserts that only the infliction of significant pain is required as a prerequisite to finding an Eighth Amendment violation. Petitioner mistakenly relies upon Whitley, 475 U.S. at 319, Ingraham v. Wright, 430 U.S. 651, 670 (1977) and Estelle v. Gamble, 429 U.S. 97, 102, 103 (1976) and misquotes from same.[1] This Court actually stated in Estelle:

> *Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible*

[1] At page seven of petitioner's petition, he erroneously asserts that only the infliction of pain violates the cruel and unusual punishment clause of the Eighth Amendment and cites Estelle, Ingraham and Whitley as support therefor. While Whitley correctly quotes from Ingraham, Ingraham does not [and neither does Wilson v. Seiter, 501 U.S. ___, 111 S. Ct. 2321, 2323 (1991)] accurately quote from Estelle. This matter was corrected by this Court in Hudson v. McMillan, 929 F.2d 1044 (5th Cir. 1990); cert. granted, ___ U.S. ___, 111 S.Ct. 1579 (1991), No. 90-6531, slip. op. at 8 (February 25, 1992) as discussed herein. Petitioner's petition cites page 671 from Ingraham and it should be page 670; and the citation to page 103 of Estelle should be to pages 102 and 103.

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with "evolving standards of decency that mark the progress of a maturing society, "...or which "involve the unnecessary and wanton infliction of pain,"....(Internal quotations omitted; emphasis ours.)

Petitioner fails to acknowledge as violative of the Eighth Amendment "punishments which are incompatible of 'evolving standards of decency that mark the progress of a maturing society'" -- the very standard re-embraced by this Court in Hudson v. McMillan. Moreover, petitioner's discussion of "significant inquiry" and reliance on its hoped-for decision by this Court [i.e., affirming the Fifth Circuit's decision in Hudson v. McMillan, 929 F.2d 1014 (5th Cir. 1990)][2] may be disregarded in light of this Court's reversal of the Fifth Circuit.

In another case miscited by petitioner[3], Cowans v. Wyrick, 862 F.2d 697, 700 (8th Cir. 1988), the Eighth Circuit stated:

. . . the jury must have found that plaintiff suffered anguish, misery or pain in

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[2] Petitioner's petition, p. 15.

[3] See pp. 7 and 8 of petitioner's petition. Reading the entire case, it is manifest that the Eighth Circuit's reference to "some measure of pain of some type" (862 F.2d at 699) is later explained as comprehending "anguish, misery or pain" (862 F.2d at 700).

order to establish that a cruel and unusual punishment was inflicted. (Emphasis ours.)

Consequently, the applicable standard is not premised upon pain. Moreover, petitioner is not required to leave a telltale sign on respondent's person; he is only required to inflict anguish, misery or pain upon respondent and he did so. As cited in Whitley, it is the "obduracy and wantonness" of the acts that characterize the prohibitions of the Eighth Amendment. Absent a legitimate prison need, the "obduracy and wantonness" of petitioner's acts are manifest.

The Court must keep in mind that respondent was an honor inmate before the Smith incident. He was accorded the respect he earned by his laudatory behavior prior to that time. Moreover, petitioner testified that he had no reason to believe respondent was involved with contraband or in violation with other prison policy when he undertook his repeated searches into plaintiff's cell.

The primary cases relied upon by petitioner relate to situations which offer no guidance to the Court in this case, namely: shooting an inmate during a prison disturbance involving the taking of a prison official as a hostage, Cowans; stripping an inmate to his underwear and placing him in an isolation cell pending investigation of an alleged breach of institutional rules, Rodgers v. Thomas, 879 F.2d 380 (8th Cir. 1989); striking of an inmate which was found accidental, Wyatt v. Delaney, 818 F.2d 21 (8th Cir. 1987); physically restraining an inmate after

he refused to cooperate with the officials and resisted efforts to handcuff him, Pressly v. Gregory, 831 F.2d 514 (4th Cir. 1987); an inmate's claim of a single occurrence of harassment which never went to trial and never was submitted to a jury, but rather decided on the officer's motion for summary judgment, Black Spotted Horse v. Else, 767 F.2d 516 (8th Cir. 1985); and the solitary event of pushing an inmate and spitting on hair clippers before giving him a hair cut, Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983).

None of these cases are factually similar to the one herein. No prison disturbance was underway during the repeated cell searches; respondent was neither being punished for violation of any institutional rules, failing to cooperate nor resisting being handcuffed; and a series of events, rather than a solitary one, was involved herein. Petitioner's cases simply are not pertinent. All respondent did was to cooperate with prison officials in exposing Smith's malicious and potentially felonious acts which violated prison policy. The proper case law to be considered in this appeal is that involving cell searches and each of the decisions on this issue can be distinguished from that appealed herein. Respondent does not claim violations of the Fourth Amendment against unreasonable searches and seizures or the Fourteenth Amendment regarding deprivation of property. The issue before this Court involves violation of the cruel and unusual punishment clause under the Eighth Amendment and under no other amendment.

Hudson v. Palmer involved a solitary "shakedown" search of the inmates locker and cell for contraband which resulted in discovery of a ripped pillow case in the trash can. Petitioner cites Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983) (petitioner's petition, p. 18), but fails to acknowledge that the Fourth Circuit reversed the district court's summary judgment relative to the Fourth Amendment finding that there was a genuine issue of material fact as to whether the "shakedown" of the inmates property was justified or conducted solely for purposes of harassment. The Fourth Circuit stated:

> In assessing the validity of a proffered justification for a search, a court should, of course, consider direct proof offered by the plaintiff that the search was impermissibly motivated, by a desire to harass or humiliate him, such as evidence of other acts of harassment by the defendant.

697 F.2d at 1225.

This case involves not just a solitary shakedown, but "other acts of harassment" -- nine "other acts of harassment" or cell searches -- with no validity proffered by petitioner or found by the courts below. Hudson v. Palmer was founded upon the Fourth Amendment, and yet the Supreme Court clearly states that violation of the Fourth Amendment protection against unreasonable search and seizure is not a prerequisite to a violation of cruel

and unusual punishment under the Eighth Amendment. The court stated:

> Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protection of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs nor does it mean that prison attendants can ride rough shot over inmates property rights with impunity. The Eighth Amendment always stand as a protection against "cruel and unusual punishments".

468 U.S. at 530.

Consequently, whether the acts of petitioner constitute a violation of the Fourth Amendment is irrelevant; such is not necessary to satisfy the protection afforded by the Eighth Amendment. Moreover, petitioner's acts cannot be viewed in a vacuum -- they must be considered in relation to the prison's needs.

Subsequent court decisions -- relied on by petitioner below -- embraced Hudson v. Palmer on this very issue. The District Court for the Southern District of New York ruled in Balabin v. Scully, 606 F.Supp. 176, 184 (S.D.N.Y. 1985):

> It is true that in ruling out a Fourth Amendment claim by prisoners in Hudson, supra, the Supreme Court explicitly refused

> to preclude an Eighth Amendment claim for harassment given the appropriate circumstances.

In Balabin, the district court found that plaintiff had made no allegations of harassment nor alleged facts suggesting an invasion of privacy that might rise to the level of cruel and unusual punishment. On this basis, the Balabin court dismissed plaintiff's Eighth Amendment causes of action. This starkly contrasts with the case appealed herein in that respondent's claims were not only not dismissed, but were sufficient to support: (1) a jury verdict in respondent's favor; (2) the district court's denial of petitioner's motion for judgment notwithstanding the verdict, or in the alternative, a new trial; and (3) the appellate court's affirmation by panel and en banc.

Similarly, the Ninth Circuit in Vigliotto v. Terry, 873 F.2d 1201, 1203 (9th Cir. 1989) embraced the above quoted language from Hudson v. Palmer and Whitley.

> The Eighth Amendment protects prisoners from searches conducted only for "calculated harassment".

The Vigliotto court could only find proof of a solitary search; despite general allegations of a number of harassing searches, the prisoner in Vigliotto did not substantiate same through proof. The Ninth Circuit stated "we hold this single incident is insufficient to satisfy Whitley." 873 F.2d at 1203. The record

herein is uncontroverted and uncontested as to petitioner's repeated searches.

Furthermore, taken in the light of Whitley, petitioner's obdurate and wanton acts are exactly the type of "calculated harassment unrelated to prison needs" which violates the cruel and unusual punishment prohibition of the Eighth Amendment.

The district court found under the standards set by Hudson and Whitley that "there is evidence from which the jury could have found that defendant Engelke's conduct constituted cruel and unusual punishment." (Appendix 3, petitioner's Petition A22).

II. A PUBLIC OFFICIAL IS NOT ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY BECAUSE THE UNLAWFULNESS OF HIS CONDUCT IS APPARENT FROM PRE-EXISTING LAW

Petitioner argues that he is protected by qualified immunity.

Under Harlow v. Fitzgerald, 457 U.S. 800 (1982), a prison official is entitled to immunity from damage, unless his conduct violated a clearly established constitutional right which a reasonable person would have known[4].

---

[4] The standard has been more recently addressed by this Court in a case cited by petitioner, Anderson v. Creighton, 483 U.S. 635, 640 (1987), ("... in the light of pre-existing law the unlawfulness must be apparent"), but that case is of little relevance here as it expressly limited to "allegedly unlawful warrantless searches of innocent third parties' homes in search of fugitives." 483 U.S. at 646.

Applying that standard to the underlying facts herein, it is clear that petitioner violated clearly established constitutional rights as enunciated in Hudson v. Palmer. Moreover, when there is no legitimate prison need being served, prison officials acts are even more circumscribed. Whitley.

As set forth above, this Court has found that "calculated harassment" unrelated to prison needs can constitute cruel and unusual punishment under the Eighth Amendment. 468 U.S. at 530. Petitioner's searching of plaintiff's cell ten times in nineteen days for the sole purpose of harassment which the jury found to be the case and the district court affirmed in its denial of Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, a new trial, manifests that petitioner's obdurate and wanton conduct inflicted anguish and misery upon respondent and thereby violated clearly established constitutional rights.[5]

CONCLUSION

In a vacuum, any one of petitioner's searches may not seem unconstitutional. But, taken together in the context of the total absence of any legitimate prison need, petitioner's acts are unconstitutional and unconscionable and accordingly, this Court must deny petitioner's petition.

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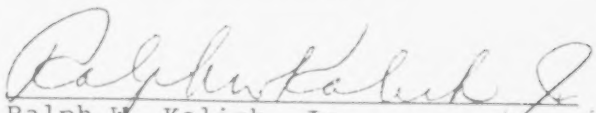
[5] Petitioner's reliance on Siegert v. Gilley, __ U.S. __, 111 S. Ct. 1789 (1991) is curious at best. The D.C. Circuit Court of Appeals, as well as this Court, concluded that the district court should have dismissed Siegert's suit. Herein, however, petitioner's claims of the violation of his constitutional rights herein were sufficient to satisfy a jury, the district court and the court of appeals.

For the above-stated reasons, this Court is respectfully requested not to grant a writ of certiorari.

Respectfully submitted,



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2/29/92